

APPENDIX F

ESA AND EFH CONSULTATION

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IN-BAY DISPOSAL AND DREDGING

Endangered Species Act Consultations/Biological Opinion

The federal *Endangered Species Act* (ESA) requires federal agencies, in consultation with the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS), to ensure that their actions are not likely to jeopardize the continued existence of federally-listed endangered or threatened species or result in the destruction or adverse modification of the critical habitat of the species (50 CFR Part 402). Likewise, the *California Endangered Species Act* requires that each state lead agency consult with the California Department of Fish and Game (CDFG) to ensure that any action authorized, funded, or carried out by that state lead agency is not likely to jeopardize the continued existence of any state-listed endangered or threatened species (Fish and Game Code Section 2090).

Since 1993, federal and state lead agencies involved in the development of the LTMS EIS/EIR have conducted informal consultation with USFWS, NMFS, and the CDFG to identify the species of concern located within the LTMS Planning Area. In addition, the LTMS agencies also entered into formal consultation with the resource agencies to identify potential impacts to sensitive species during dredging and aquatic disposal operations. The purpose of these consultations was to provide the LTMS agencies, the resource agencies, and the dredging community a set of common guidelines to avoid adverse impacts on species of concern from dredging and disposal activities, and to establish a more predictable regulatory environment for dredging and aquatic disposal.

The final result of these consultations included three biological opinions which identify the species of special concern, the agencies' conclusions regarding proposed restrictions on the timing and design of dredging and disposal projects, and consultation and permit requirements. The following sections describe the pertinent information presented in the biological opinions, and the final Record of Decision (ROD), signed by the U.S. Environmental Protection Agency (USEPA) and U.S. Army Corps of Engineers (USACE) July 1999.

Species of Special Concern

The USFWS and CDFG provided lists of special status species that could potentially occur in the LTMS Planning Area (12 counties) or that might be affected by dredging and disposal activities. A special status species is defined as any species that is listed, is a candidate for listing, or has been recommended by a federal agency for listing as threatened or endangered under the ESA. While the Planning Area spans all 12 counties, there are many locations within each county where dredging and/or disposal is not expected.

Areas and Times of Restricted Dredging Activity in the San Francisco Bay/Delta for Species of Special Concern

At the critical locations and within the restricted periods defined in the Table, dredging may not be permitted unless specific consultation with the resource agencies is initiated and approval is obtained. In cases where species of concern are not present and not expected to be present, normal dredging during these restricted periods may be approved on a case-by-case, limited basis by the appropriate agencies. In cases where the species of concern are present, the use of special mitigation measures may also enable dredging during restricted periods without undue adverse effects. The mitigation measures are noted as consultation and permit requirements.

Areas and Times of Restricted Disposal Activity in the San Francisco Bay/ Delta for Species of Special Concern

At the critical locations and within the restricted periods defined in the Table, dredged material disposal activities may not be permitted unless specific consultation with the resource agencies is initiated and approval is obtained. In cases where species of concern are not present and not expected to be present, normal dredged material disposal during these restricted periods may be approved on a case-by-case, limited basis by the appropriate agencies. In cases where the species of concern are present, the use of special mitigation measures may also enable disposal during restricted periods without undue adverse effects. The mitigation measures are noted as consultation and permit requirements.

Consultation and Permit Requirements for Dredging and Disposal Activities in the San Francisco Bay/Delta for Species of Special Concern

If an activity is proposed within the restricted period for federal -or state-listed threatened or endangered species, then the resource agencies must be contacted unless the project can proceed according to the consultation and permit requirements described in the Table.

Section 7 Endangered Species Consultation

Section 7 of the ESA (1973) provides some of the most valuable and powerful tools to conserve listed species, assist with species' recovery, and help protect critical habitat. It mandates all federal agencies to determine how to use their existing authorities to further the purposes of the ESA to aid in recovering listed species, and to address existing and potential conservation issues. Under Section 7(a)(2) of the ESA, it states that each federal agency shall, in consultation with and with assistance of the Secretary of the Interior (USFWS)/Commerce (NMFS), shall insure that any action authorized, funded, or carried out by such agency (called an "agency action" such as issuing permits for private dredgers) is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of the habitat of such species, which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless the action agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of the ESA. In fulfilling the requirements

of this Section 7(a)(2), each action agency shall use the best scientific and commercial data available.

Furthermore, under Section 7(a)(3) of the ESA, the federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant (or agency) has reason to believe that an endangered or threatened species present in the area affected by his project and that implementation of such action will likely affect such species. Therefore, the federal action would thus involve both the approval of a permit or license sought by an applicant, along with the activities resulting from that action. After the action agency has initiated *informal consultation* [under Section 7(b)(2) and (3)] with the Secretary, the Secretary shall provide to the federal action agency and the applicant, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or critical habitat. If a jeopardy or adverse modification is found, the Secretary will suggest those reasonable and prudent alternatives, which he believes would not violate subsection (a)(2), and can be taken by the federal agency or applicant in implementing the agency action.

If a proposed federal action may affect a listed species or designated critical habitat, *formal consultation* is required (except when the USFWS and NMFS concur, in writing, that a proposed action "is not likely to adversely affect" listed species or designated critical habitat). A formal consultation concludes with the issuance of a biological opinion and incidental take statement by either or both USFWS and/or NMFS. USFWS's and NMFS's *Endangered Species Consultation Handbook* (USFWS and NMFS March 1998) is useful for the applicant/permittee to understand the oftentimes complex and detailed requirements under the ESA to implement a dredging/disposal action. Presently, the Regulatory Branch of the San Francisco District USACE is coordinating with both USFWS and NMFS to implement measures to streamline the consultation process for applicants/permittees. The ultimate goal would be to develop procedures to effectively shorten consultation timeframes, without giving up protection for listed/designated critical habitats or the use and review of the best available information. This could include enhanced agency coordination and the development of guidelines for implementation of a large program (e.g., in-Bay dredging/disposal biological windows/ restrictions), which then could possibly tier to an individual project, and in addition, provide consultation simultaneously with project analysis under the National Environmental Policy Act (NEPA).

Magnuson-Stephens Fishery Conservation and Management Act Consultation

The federal MSFCMA requires federal agencies to consult with the National Marine Fisheries Service (NMFS) regarding the potential effects of actions on "essential fish habitat" (EFH), and respond in writing to NMFS recommendations. State agency activities which would impact EFH also require NMFS comment.

Programmatic consultations may be implemented, but to date have not been for the San Francisco Bay region. The USACE has initiated action to undertake programmatic consultation and future versions of the LTMS Management Plan may contain additional information, including restrictions on EFH.

